(16)

No. 96-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HON. THOMAS R. PHILLIPS, ET AL.,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE COLUMBUS, AKRON, CINCINNATI, CLEVELAND, DAYTON, TOLEDO, CUYAHOGA COUNTY, AND STARK COUNTY BAR ASSOCIATIONS; THE LEGAL AID SOCIETIES OF COLUMBUS, CINCINNATI, CLEVELAND, DAYTON, TOLEDO, ASHTABULA COUNTY, BUTLER-WARREN, NORTHEAST OHIO, AND STARK COUNTY; CHILDREN'S DEFENSE FUND—OHIO; THE COALITION ON HOMELESSNESS AND HOUSING IN OHIO; OHIO HUNGER TASK FORCE; OHIO COUNCIL OF CHURCHES; CATHOLIC CONFERENCE OF OHIO; OHIO DOMESTIC VIOLENCE NETWORK; PRO SENIORS; ADVOCATES FOR BASIC LEGAL EQUALITY; OHIO STATE LEGAL SERVICES ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

The Columbus Bar Association and the other *amici* bar associations are non-profit organizations that were created to deal with issues involving the governance and responsibilities of the practicing bar. Among these responsibilities, in their view,

is the need to address the persistent problem of assuring access to legal services for the economically disadvantaged. In this regard, the *amici* bar associations have been directly involved with the "Interest on Lawyers' Trust Account Program" ("IOLTA" program) in the State of Ohio, which has emerged as an innovative means of creating funding for legal services to the poor out of sources that could not be utilized to generate any income prior to the institution of this program.

The Legal Aid Society of Columbus, along with the other *amici* legal aid groups, are non-profit organizations that are committed to providing legal aid services to those who ordinarily do not have adequate access to such services in our society, usually because of personal financial constraints. In recent years, as the Federal government's financial support for these services has declined and become more uncertain, the *amici* legal aid societies, like other similar groups around the country, have been able to draw upon the resources provided by IOLTA programs and other sources to continue their work. If IOLTA programs are disabled by decisions like the ruling of the court below, then the continued activities of non-profit organizations like the *amici* legal aid societies will be jeopardized. The consequent harm to those who lack the resources to have meaningful access to our courts is obvious, and would cause them to suffer even greater difficulty in realizing the constitutional promise that they should have the "equal protection of the laws."

The other *amici* groups who join this brief are either direct consumers of legal aid services financed by the Ohio IOLTA program or regularly refer individuals who make use of those services because they lack any other recourse in obtaining meaningful access to the courts. Children Defense Fund—Ohio is committed to improving conditions for children, including many who have been abandoned, abused, or neglected, and thus require legal assistance. The Coalition on Homelessness and

Housing in Ohio and the Ohio Hunger Task Force address on a daily basis the needs of Ohio citizens who lack basic housing and nourishment, let alone access to legal services to aid them in securing their basic rights and entitlements. The members of the Ohio Council of Churches and the Catholic Conference of Ohio care for individuals and families who sometimes require access to essential legal services they cannot afford, for a great variety of reasons. The Ohio Domestic Violence Network works with victims of domestic violence who often suffer because of systemic failures in the legal process, including their inability to obtain legal representation to seek the protections afforded by the law. Pro Seniors focuses on the concerns of elderly Ohio citizens, who have their own unique legal needs and problems and yet sometimes lack the ability to afford meaningful representation in our courts. All of these groups agree upon the critical need for state IOLTA programs, which provide funding to assure the wider availability of basic legal services for the poor and disadvantaged.

For these reasons, the *amici curiae* have a direct interest in the constitutional issues raised in this case, the resolution of which will dictate whether IOLTA programs will be able to continue to operate in every jurisdiction where they have been approved and implemented. This broad coalition of groups is representative of the range of people who would be adversely affected if this source of funding for legal services were to be curtailed; it vividly demonstrates that IOLTA programs are of increasing importance to assure the continued availability of these services to many individuals who cannot otherwise afford to protect their legal rights by hiring a lawyer on their own.[1]

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[1] Counsel for petitioners and respondents have consented to the filing of this brief. Letters evidencing such consent are on file in the Clerk's office.

QUESTION PRESENTED

Whether state IOLTA programs, which aggregate client trust funds that would not otherwise earn any interest so that the interest on the combined funds can be utilized by non-profit organizations whose primary purpose is the direct provision of legal services to the poor, constitute an unconstitutional "taking" of property for public use without "just compensation."

SUMMARY OF ARGUMENT

IOLTA programs, which have been adopted in essentially the same form everywhere in the country, do not effect an unconstitutional "taking." By definition, all of the amounts deposited under the terms of an IOLTA program are funds that would be unable to earn interest on their own account, either because the amounts are too insignificant or because the deposits are too transitory to permit the accrual of interest that would make it feasible, in light of banking restrictions and administrative charges, to earn any actual return. Because of this central fact, which is undisputed in this case, IOLTA programs do not effect a "taking" of any cognizable "property interest" within the meaning of the Fifth and Fourteenth Amendments. The program simply creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances.

Even if the Court were to find that IOLTA programs did somehow effect a "taking" of property within the meaning of the constitutional terms, that result is not accomplished without "just compensation." Under the two tests that the Court has applied to determine the amount of "just compensation" in different circumstances—the "fair market value" test and the "value to the owner" test—the amount of earnings on funds that are eligible for state IOLTA programs is zero. The Court has consistently rejected the application of a "value to the taker"

measure for just compensation. Such a measure would compensate what is acquired, not what is taken, and thus would be directly inconsistent with the text of the Takings Clause. Moreover, the Court has held in various contexts that the government is not required to provide compensation to the property owner for elements of the property's value that the government itself has created, which is obviously true of the IOLTA program itself.

ARGUMENT

IOLTA programs, which have been adopted in essentially the same form everywhere in the country, *see* Pet. 3, do not effect an unconstitutional "taking." The key facts underlying this case were established in the District Court, and were not disputed by the parties. *See Washington Legal Found. v. Texas Equal Access to Justice Found.*, 873 F. Supp. 1, 4 (W.D. Tex. 1995), *rev'd*, 94 F.3d 996 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2535 (1997). The IOLTA program concerns client funds that, for various reasons, have been tendered to attorneys for safekeeping. Under the rules governing all IOLTA programs, each such attorney is obliged to determine whether the funds entrusted to him or her "can be deposited into an account that could reasonably be expected to earn an amount of interest sufficient to offset the cost of establishing and maintaining the account." *Id.* (quoting Texas State Bar IOLTA Rule 6). Only funds that do not fall within this category are eligible for treatment as IOLTA funds.

By definition, therefore, all of the amounts deposited under the terms of an IOLTA program are funds that would be unable to earn interest on their own account, in view of applicable banking restrictions, administrative charges, service charges, accounting costs, and tax reporting costs. *See* 873 F. Supp. at 4. Because these funds are either nominal in amount or held only for a short term, there is simply no possibility that these

funds would be able to earn any net interest income that could benefit the individual clients for whom the funds are held. *Id* Once again, it bears emphasis that this central fact is undisputed in this case.[2]

I. STATE IOLTA PROGRAMS ARE BASED ON FUNDS THAT COULD NOT EARN INTEREST IN THE ABSENCE OF THE IOLTA PROGRAM ITSELF, AND HENCE DO NOT EFFECT AN IMPROPER "TAKING" OF PROPERTY.

A. The Court Below Misapplied This Court's Holding in the *Webb's* Case.

The court below decided this case incorrectly, and in a manner that "contradicts every other court in the country that has addressed this issue," *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 106 F.3d 640, 641 (5th Cir. 1996) (denying rehearing and rehearing *en banc*) (Benavides, J., dissenting), largely because it misconstrued the effect of this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In that case, the Court addressed the issue of "whether it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's services in receiving the fund into the registry." *Id.* at 155-56.

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[2] The District Court took special pains to note that there was no genuine issue of material fact concerning whether "sub-accounting is a practical means of generating net interest for clients who deposit small amounts of money with their attorney" because it was conceded that "any type of account that can earn interest beyond the costs of maintaining such account is beyond the scope of IOLTA's coverage." 873 F. Supp. at 4 n.2.

The proper construction of this Court's decision in the *Webb's* case, as it bears upon the validity of state IOLTA programs, was set out by the Florida Supreme Court only a year after that decision was rendered. *See Matter of Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981). In the course of its opinion rejecting the claim that Florida's IOLTA program constituted an improper taking, the court cogently explained why the principles of the *Webb's* decision were most consistent with this result.

In *Webb's*, a client was obliged by law to tender the $1,800,000 purchase price of a business to the clerk of the court in an interpleader action. In accordance with state law, those funds were deposited into a distinct interest-bearing account, and they earned more than $100,000 in interest before the matter was finally resolved. In these circumstances, this Court held that the Takings Clause was violated when the clerk ultimately closed the fund and returned the $1,800,000 amount of the deposit, but refused to pay out any of the interest accrued by that private fund to the client. *See* 449 U.S. at 160-65.

The Florida Supreme Court noted that the administration of an IOLTA program differs from the circumstances of the *Webb's* case in material respects. Most important is the fact that all of the amounts deposited under the terms of an IOLTA program are funds that would be unable to earn interest on their own account—once again, either because the amounts are too insignificant or because the deposits are too transitory to permit the accrual of interest that would make it feasible, in light of banking restrictions and administrative charges, to earn any actual return. *See Matter of Interest*, 402 So. 2d at 395. Based on this central distinction, the court concluded that the IOLTA program does not effect a "taking" within the meaning of the Constitution:

> The most relevant distinction [between an IOLTA program and the *Webb's* case], plainly, is the fact that no client is compelled to part with "property" by reason of a state directive, since the program *creates income where there had been none before*, and the income thus created would *never benefit the client under any set of circumstances*. . . . It follows that no client has a "property interest," in the constitutional sense, which is being taken from him by this program.

Id. at 395-96 (emphasis added). On this basis, the Florida Supreme Court approved this method of "enhanc[ing] the capability of the legal profession to deliver legal services to the poor," which "has long been a cherished commitment of this Court." *Id.* at 396; *see also, e.g., Petition by Mass. Bar Ass'n*, 478 N.E.2d 715, 718 (Mass. 1985) ("We agree with the Florida court's analysis and conclude that there is no constitutional impediment to the IOLTA proposal"); *Petition of N.H. Bar Ass'n*, 453 A.2d 1258, 1261 (1982) (same).

The threshold issue in this case, as in *Webb's*, is whether the complaining party has a valid "property right" that has been "taken," which triggers the constitutional command that just compensation be made. This Court closed its opinion in *Webb's* by cautioning that its holding should not be read to apply outside a situation where "the deposited fund itself concededly is private." 449 U.S. at 164-65. This is obviously not the case with IOLTA funds, which are conceded to be incapable of producing any accrued return whatsoever if the principal were to be deposited in a private fund. *See* pages 4-5, *supra*.

Ignoring these *caveats*, the panel below construed *Webb's* very broadly to stand for an across-the-board legal principle that interest must follow principal without regard to any of the particular circumstances of the funds deposited or to the methods of administering those funds. *See* 94 F.3d at 1000-01.

But the Eleventh Circuit has provided the decisive answer to this oversimplified approach, noting that "when Justice Johnson observed in *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319 (1809), that 'interest goes with the principal, as the fruit with the tree,' his illustration necessarily assumed the existence of a fruit-bearing tree." *Cone v. State Bar of Fla.*, 819 F.2d 1002, 1004 (11th Cir.) (other quotes omitted), *cert. denied*, 484 U.S. 917 (1984).

The Eleventh Circuit went on to explain that the funds at issue in *Webb's*, which "were sufficient in amount, and held for a sufficient period of time, to generate $90,000 in interest over a year and a half," did "give rise to a legitimate claim of entitlement" to those proceeds. *Cone*, 819 F.2d at 1007. By contrast, the deposits made under the terms of the IOLTA program can produce no net value, for it is conceded that they could not generate any "legitimate expectation of interest exclusive of administrative costs and expenses." *Id.* (internal quotes omitted). The court stressed that the point was *not* that the amount of income generated was slight and therefore subject to some sort of "*de minimis*" exception to the Takings Clause. Instead, the point was that because each individual deposit in the IOLTA program, standing alone, "could not earn *anything*," the program effected "*no taking* of any property" belonging to any individual depositor. *Id.* (emphasis added).

This analysis thus goes to the Court's statement in *Webb's* that a "mere unilateral expectation" is not "a property interest entitled to protection" under the Constitution. 449 U.S. at 161. In *Webb's*, the Court held that the creditors who paid in the $1,800,000 to the private deposited fund "had more than a unilateral expectation," for eventually that fund and any accretions to it, "less proper charges authorized by the court," would be distributed to them. *Id.* Under the specific terms of the IOLTA programs, however, the client does not have any reasonable basis even for a "unilateral expectation" of any

accretions to these funds, which by definition are incapable of earning any interest upon the principal under the circumstances in which these funds are held.

The dissenting judges below also pointed out the panel's misplaced reliance on the *Webb's* decision. "A careful reading of *Webb's* makes clear that the existence of interest proceeds *to which the depositors were entitled* was a prerequisite to the Court's decision." 106 F.3d at 643 (emphasis added). Because this Court went out of its way to recognize that any proceeds from the interpleader fund would first have to be reduced by all "proper charges" before they could be distributed to lawful claimants, this strongly suggests that "the state law rule that 'interest follows principal' controls only when interest is earned on the principal or, in other words, when interest proceeds are available." *Id.* (discussing *Webb's*, 449 U.S. at 161-65). Once again, no such interest proceeds could ever be made available to the client, by definition, under the specific terms of the state IOLTA programs.

B. Plaintiffs Have No Legitimate Property Right or "Claim of Entitlement" to IOLTA Funds.

The dissenting judges below also explained that because the IOLTA funds are not able to generate any income, net of expenses, apart from the organization and operation of the IOLTA program itself, the federal and state courts have consistently held that the complaining parties have no specific and legitimate "claim of entitlement" to funds created by the IOLTA program. 106 F.3d at 1004-05. This approach to the issue draws upon the Court's decisions in the companion cases of *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972), which rest the constitutional recognition of a valid property interest upon whether a "legitimate claim of entitlement" is made out under state law. *See Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601-02.

An analysis based on cases like *Roth* and *Perry* is appropriate because the issue presented in this case is unlike the situation of a physical taking of tangible property. Under the terms of the IOLTA programs, the nominal or transitory nature of the deposited funds does not give rise to any "reasonable investment-backed expectation" that any net proceeds will be generated from their use. *Webb's*, 449 U.S. at 161. The Court has stressed that such a "property right" must be grounded in "a legitimate claim of entitlement," which cannot exist without a strong element of justified reliance upon the asserted claim. *Roth*, 408 U.S. at 577. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), for example, the Court held that even where a company has valid property rights in protecting its acknowledged trade secrets, no "taking" occurs unless the required disclosure of such information interferes with any "reasonable investment-backed expectations." *Id.* at 1004-14.

Applying this analysis, the dissenting judges below stressed that no "positive rules of substantive law or mutually explicit understandings" were identified to support the plaintiff's *post hoc*, unilateral claim of entitlement to receive interest that was generated solely by the special operations of the IOLTA program. *See* 106 F.3d at 1004-05. Thus there was no basis for finding an unconstitutional taking.

The court below tried to supply this deficiency by devising its own account of "the precise events of the transaction" at issue under the IOLTA programs. 94 F.3d at 1003. It asserted that the IOLTA transaction always involves a two-step process, whereby "a bank pays interest on the account and then deducts fees." *Id.* at 1003. Ignoring the crucial fact that the trial court had found these "fees" and charges to exceed any interest payments generated by any individual client's IOLTA funds, the court concluded that "a property interest attaches the moment that the interest accrues" and remains vested in the owner of the principal. *Id.*

The dissenting judges also refuted this point. Noting in passing that it was uncertain whether "the panel presents an accurate picture of banking practices," they ultimately found this description to be simply irrelevant:

> For purposes of a takings clause challenge, a constitutionally cognizable interest in property does not exist in "earnings" from a deposited fund unless and until those earnings can be distributed as proceeds to the fund's beneficiary. Because IOLTA-eligible funds would never produce interest proceeds, earnings from such funds cannot be distributed to the funds' owners. For this reason, the panel's conclusion that a property interest was created after the first step in the bank's process of assigning interest is simply wrong.

106 F.3d at 643-44. *See also Matter of Interest on Lawyers' Trust*, 675 S.W.2d 355, 357 (Ark. 1984) (because "earnings of funds held in trust accounts can benefit neither the attorney nor the client, but simply redound to the benefit of the depository institution," aggregating those funds for the purpose of generating a new source of income to fund legal services to the poor is not a taking of property); *Petition of Minn. State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982) ("There simply is no 'property' now in existence that would be taken.").

C. The Takings Analysis Adopted in *Penn Central* Also Validates the IOLTA Program.

In a case challenging the Massachusetts IOLTA program, the First Circuit took a slightly different approach in resolving similar constitutional claims, ultimately concluding that the complaining parties did not "possess a recognized property interest which may be protected by the Fifth Amendment." *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 973 (1st Cir. 1993).

In reaching this conclusion, the First Circuit applied this Court's formal three-part test, first articulated in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978), and further developed in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), for determining when a government regulation amounts to a taking of property within the meaning of the Fifth and Fourteenth Amendments. Examining the three prongs of this test, the court held: that there was no physical invasion of property rights under such programs; that their "economic impact" on individual clients is negligible; and that they do not interfere "with distinct investment-backed expectations." 993 F.2d at 974-76 (citing *Connolly* and *Penn Central*).

In determining whether claims raised by individual clients to the proceeds generated by IOLTA funds amounted to protected "property" under this approach, the court first ruled that the IOLTA program did not work "a physical invasion of real property" that would constitute a *per se* taking under this Court's precedents. *Id.* at 975.[3] The plaintiffs had sought to analogize the purported "taking" effected by the IOLTA program to the kinds of physical invasions of property that had resulted from government regulation of the uses of a marina, *see Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and the mandated attachment of conduits for cable television to private buildings, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Rejecting these arguments, the court found "no logical analogy between the physical invasion of real property, as in *Kaiser* and *Loretto*, and the operation of the IOLTA Rule." 993 F.2d at 975.

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[3] The court had previously recognized that the Constitution protects both tangible and intangible property rights, but quoted with approval this Court's holding in *Webb's* that "'a mere unilateral expectation or an abstract need is not a property interest entitled to protection.'" 993 F.2d at 973-74 (quoting *Webb's*, 449 U.S. at 161).

The First Circuit also agreed with the Eleventh Circuit's analysis in distinguishing the *Webb's* case because "the plaintiffs do not have a property right to the interest earned on their funds held in IOLTA accounts." 993 F.2d at 975-76 (citing *Cone*, 819 F.2d at 1006-07). Based on this reasoning, the court dispatched the plaintiffs' taking claims by holding that "the IOLTA program does not occupy or invade the plaintiffs' property even temporarily." *Id.* at 976. This holding was based on the court's determinations that "the IOLTA program leaves the deposited funds untouched," "the funds are always available to clients," and "the interest earned on IOLTA accounts is not the plaintiffs' property." *Id.* In this context, the only conceivable conclusions were that "[t]he property rights claimed by the plaintiffs were intangible," and that the IOLTA program causes no "physical invasion and occupation of their intangible property rights." *Id.*

The court then proceeded to the second and third steps of the *Connolly* test, which it treated together. The complaining parties claimed the right "to control and to exclude others from the beneficial use of funds held by lawyers," which were the only claims that remained open to them once the court had decided that they had no valid right to the interest earned on IOLTA funds. None of these claims, however, could generate any "economic benefit for the plaintiffs because clients would not otherwise be entitled to the interest earned on pooled accounts." 993 F.2d at 976. For the same reasons, the court found that "there are no 'investment-backed' expectations" to be preserved in the context of the IOLTA program. *Id.* (citing *Connolly*, 475 U.S. at 225). Based on its analysis of this Court's three-part test for assessing the effect of a government regulation, therefore, the court ultimately held that "the IOLTA Rule has not caused a taking of plaintiff's property." 993 F.2d at 976.

The First Circuit thus imported the main features of the Eleventh Circuit's analysis of the takings issue into the more

rigorous framework of the three-part test that this Court laid out in the *Penn Central* and *Connolly* decisions. The core of that analysis, once again, is that because individual client funds would not be able to earn interest on their own account, net of expenses and administrative charges, the income generated by the operation of IOLTA programs is not "property" within the meaning of the Takings Clause. In addition, the First Circuit went further to analyze the takings issue from the standpoint applied more generally to other government regulations, and found by the same rationale that individual clients had no legitimate "expectation-backed" expectations to control the use of proceeds that would not have been able to accrue from their own individual fund accounts. *See* 993 F.2d at 973-76.

These conclusions are undoubtedly correct. In the end, the constitutional bottom line is that the state IOLTA programs simply create income where there could have been none before, and the income thus created would never have been able to benefit the client under any circumstances. As a result, there is no infringement of a valid property interest by the operation of these programs.

II. EVEN IF STATE IOLTA PROGRAMS DID CONSTITUTE A "TAKING" OF PROPERTY, ANY SUCH TAKING WOULD NOT BE MADE WITHOUT "JUST COMPENSATION" AND THUS WOULD BE PERMISSIBLE UNDER THE TERMS OF THE TAKINGS CLAUSE.

Even if the Court were to find that IOLTA programs did somehow effect a "taking" of property within the meaning of the constitutional terms, that result is not accomplished without "just compensation." The Court has consistently rejected the application of a "value to the taker" measure for just compensation, and under the two tests that the Court has applied to determine the amount of "just compensation" in

different circumstances—the "fair market value" test and the "value to the owner" test—the amount of earnings on funds that are eligible for state IOLTA programs is zero.

In his dissent below from the order denying rehearing *en banc*, Judge Benavides posed the issue of what compensation is just in the context of IOLTA programs. *See* 106 F.3d at 644. He observed that "applying Fifth Amendment protections to an asserted property interest that does not have any compensable value is not consistent with the purposes that underlie the Takings Clause -- to compensate a property owner for the value of her property that was taken for public use." *Id.*

This observation is consistent with a long line of decisions by the Court that have explored and delineated the meaning of the "just compensation" requirement. Justice Holmes long ago summarized the proper test under this component of the Takings Clause as a determination of "what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). The Court has linked this principle to the definition of the term "compensation," noting, for example, that "[b]ecause gain to the taker" may be "wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). The same principle inheres (to the owner's benefit) in the Court's determination of when a taking occurs, for it is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes the taking." *Ruckelshaus*, 467 U.S. at 1004-05.

Indeed, the facts of the *Boston Chamber of Commerce* case, in particular, bear a careful comparison to the facts underlying the IOLTA program. There the City of Boston exercised its power of eminent domain to lay out a public street upon a parcel of land. The ownership rights in this parcel were

divided among several different parties—the Boston Chamber of Commerce owned the fee of the land; a wharf company had an easement of way, light, and air over the land; and a bank held a mortgage on the land, subject to the easement. *See* 217 U.S. at 193. These parties agreed to take the position in the resulting litigation that the value of the land taken should be assessed as an unrestricted fee. The City refused to assent to this claim, and noted that the easement considerably lessened the value of the underlying fee interest. It was ultimately stipulated by the parties that if the City prevailed in its view of the matter, the amount of just compensation for the parcel would be $5,000, whereas if the consortium of interests were to prevail, the price would be $60,000. *Id.*

The Massachusetts state courts held for the City, and this Court affirmed. It began by stating that the "only question to be considered is whether when a man's land is taken he is entitled by the Fourteenth Amendment to recover more than the value of it as it stood at the time." 217 U.S. at 194. It noted that the complaining parties were seeking to have their property valued in a manner that presupposed the uniting of their distinct interests, even though it was highly likely and in any event not at all certain that this would ever have occurred without the government's exercise of its eminent domain authority. In a striking summary of the issue, therefore, the Court observed that the real question was whether, "*by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.*" *Id.* (emphasis added). The Court found this question to be easily answered in favor of the City, commenting that this "statement of the contention seems to us to be enough." *Id.*

The Court went on, however, to articulate more fully the rationale for this conclusion:

> [T]he Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as a matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement.

217 U.S. at 195.

If the same analysis is applied to the IOLTA programs, it is clear that even if a "taking" were to be found, the amount of "just compensation" required to be paid to parties such as the plaintiffs is zero. Under the rules of these programs, the funds deposited in the IOLTA accounts are either too small or are held for too brief a period to generate any interest income standing on their own. It is *only* the aggregation of these funds under the terms of the IOLTA programs themselves that makes it possible to generate any income at all. As in the *Boston Chamber of Commerce* case, however, the complaining parties here are demanding that the courts assess their property interests in a manner that "disregard[s] the mode of ownership" and treats each distinct account as though it were part of an unencumbered whole when it has never been held, and would never be held, in this fashion apart from the IOLTA program itself. *See* 217 U.S. at 195. Thus the real question here too is whether, "by a simple joinder of parties after the [assumed] taking, the [government] could be made to pay for a loss of theoretical creation, suffered by no one in fact." *Id.* at 194. Once again, the mere "statement of the contention" is more than enough to refute it. *Id.*

In other words, as Judge Benavides concluded, the plaintiffs in this case, and any other parties challenging the administration of the various state IOLTA programs, "are entitled to just compensation, *i.e.*, the fair market value of their property. Because the fair market value of the earnings of IOLTA-eligible funds is $0, the client would be entitled to nothing." 106 F.3d at 644. Because none of these client funds would be able to earn any net interest on their own, and the only "profit" previously derived from them had redounded to the sole benefit of the depository institutions, both the value to the owner and the fair market value of these accounts is indeed zero. In consequence, no client is "justly entitled" to funds generated by the aggregation of those distinct accounts, which occurs solely under the operation of the IOLTA programs.

The same basic principles can also be gleaned from yet another series of decisions that are applicable here. The Court has long held that when the government effects a taking of property, basic fairness dictates that the government is not required to compensate the property owner for elements of the property's value that the government itself has created. *See, e.g., United States v. Fuller*, 409 U.S. 488 (1973) (value created by government's grant of a revocable permit to graze his animals on adjoining Federal lands); *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943) (value created was business opportunity dependent on owner's privilege to use the state's power of eminent domain).

This longstanding principle extends at least as far back as *McGovern v. City of New York*, 229 U.S. 363 (1913). In that case, the City took title to various parcels of land in order to incorporate them as part of a reservoir. The complaining parties sought to recover as "just compensation" the enhanced value of the land when used for that purpose; in response, the City sought to limit compensation to the fair market value of each parcel at the time it was purchased. *Id.* at 371-72.

This Court sided with the City. Again, a central tenet of its analysis was that there were "hundreds of titles to different parcels of that land," which were only "brought together by a taking under eminent domain." 229 U.S. at 372. The likelihood that this could have occurred by any other means "might be regarded as too remote and speculative to have any legitimate effect upon the valuation." *Id.* As a result, the complaining party "was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be practical consideration and actually to influence prices." *Id.* (citing *Boston Chamber of Commerce*, 217 U.S. at 195).

If those same bounds are applied to the operation of state IOLTA programs, then any alleged "taking" of property would not be compensable because the individual client's funds are, by strict definition, incapable of generating any income net of administrative expenses, and any value derived from the funds is created solely by the operation of the IOLTA program itself. The likelihood that each individual client fund would be aggregated with other funds to generate net interest income, absent the implementation of the IOLTA program, is obviously nil. The complaining parties thus are not entitled to claim the value of that "hypothetical possibility," whose manifestation in concrete form is solely attributable to the government's unilateral action. *McGovern*, 229 U.S. at 372.

* * *

Finally, even though the point is not strictly germane either to the narrow legal determinations of whether a "property interest" exists or what "just compensation" requires under the peculiar circumstances of IOLTA programs, it is impossible to decide this case entirely in a vacuum that would divorce it from its important practical consequences. Over the past two

decades, state IOLTA programs have been implemented in every jurisdiction nationwide, at the behest of thousands of thoughtful attorneys and judges who have shaped and then blessed their implementation. Their operation is of increasing importance to assure the continued availability of legal services to many deserving individuals who cannot afford to hire a lawyer on their own.

As Judge Benavides and the other dissenting judges have pointed out, the ruling below threatens the very survival of the state IOLTA programs, which are "a primary source of funding for public interest legal organizations" at a time "when those organizations are already struggling for their lives financially." 106 F.3d at 641-42. Surely the public interest does not require the Court to sacrifice the substantial benefits of these innovative programs merely for the sake of extending doctrines of property law that were designed to apply in very different circumstances. None of the core principles of the Court's takings jurisprudence would be threatened in the least by upholding the constitutional validity of the unique programs at issue in this case.

CONCLUSION

For the foregoing reasons, as well as those stated by petitioners, the judgment below should be reversed.

Respectfully submitted,

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